Supreme Court, U.S.
FILED
AUG 12 1994
OFFICE OF THE CLERK

No. 94-73

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

SOUTHWESTERN BELL TELEPHONE COMPANY,
Petitioner,
v.
OKLAHOMA CORPORATION COMMISSION,
Respondent.

On Petition for Writ of Certiorari to the
Supreme Court of Oklahoma

BRIEF IN OPPOSITION FOR THE STATE OF OKLAHOMA

SUSAN B. LOVING
Attorney General of the State of Oklahoma
RICK D. CHAMBERLAIN*
Assistant Attorney General
**Counsel of Record for Respondent, State of Oklahoma*
2300 N. Lincoln Blvd., Room 112
Oklahoma City, OK 73105
(405) 521-3921

August 12, 1994

QUESTIONS PRESENTED

1. Should this Court exercise its extraordinary jurisdiction where the Oklahoma Supreme Court has not yet finally decided the issue of Commissioner Anthony's bias and related questions of law and fact regarding Bell's right to seek his recusal, nor completed its due process scrutiny?

2. Should this Court exercise its extraordinary jurisdiction where Bell has a more appropriate remedy available: the right to an evidentiary hearing before the Oklahoma Corporation Commission and an appeal of right to, and independent judicial review by the Oklahoma Supreme Court?

3. Should this Court exercise its extraordinary jurisdiction where the Oklahoma Supreme Court has simply followed this Court's guidance and refused to apply strict judicial due process protections to legislative administrative hearings?

4. Should this Court exercise its extraordinary jurisdiction where there is no confusion among the various states as to the requirements of federal constitutional due process in legislative administrative hearings?

PARTIES TO THE PROCEEDING

By statute, Oklahoma Legislature has mandated that the Attorney General of the State of Oklahoma shall protect the interests of Oklahoma utility customers, including those of Southwestern Bell Telephone Company ("Bell"), "in all rate-related proceedings before the Corporation Commission or in any other state or federal judicial....proceeding." Okla. Stat. tit. 74, sec. 18b(A)(20)(Supp.1993); see Appendix A. This mandate endowed the Attorney General with the status of party in the case below. Therefore, pursuant to *Sup. Ct. R.* 12.4., the Oklahoma Attorney General is a respondent in this proceeding.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES vii

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 9

ARGUMENT 10

I. BELL'S PETITION SHOULD BE DENIED BECAUSE FINALITY IS ABSENT: THE OKLAHOMA SUPREME COURT HAS NOT DECIDED WHETHER COMMISSIONER ANTHONY IS BIASED, WHETHER HIS PARTICIPATION IN THE PUD 260 VIOLATES DUE PROCESS, OR WHETHER BELL HAS THE RIGHT TO SEEK COMMISSIONER ANTHONY'S DISQUALIFICATION 10

A. Certiorari Should not be Granted Where Finality is not Present 10

B. The Oklahoma Supreme Court has not Ruled on Bell's Claim of Bias or Whether Commissioner Anthony's Participation in the PUD 260 Remand is a Denial of

Constitutional Due Process. The Court has Only Ruled That Bell is not Entitled to a Pre-hearing Disqualification of Anthony and Must Raise its Claim on Appeal 11

C. The Oklahoma Supreme Court has not yet Ruled on Significant Questions of Law and Fact Impacting Bell's Petition: Whether the Bell Representatives Who Offered Money to Commissioner Anthony were Acting on Bell's Behalf and, if so, Whether Bell's Misconduct Precludes it From Seeking Anthony's Disqualification 12

II. BELL'S PETITION SHOULD BE DENIED BECAUSE ANOTHER MORE APPROPRIATE REMEDY IS AVAILABLE 14

A. Certiorari Should be Denied Where an Adequate Alternative Remedy is Available 14

B. The Oklahoma Supreme Court's Decision Does not Deprive Bell of Substantial Justice Since Bell is Assured of a Number of Procedural

Safeguards to Protect its Interests, Including the Right to an Evidentiary Hearing Before the Commission and an Appeal of Right to the Oklahoma Supreme Court 14

III. BELL'S PETITION SHOULD BE DENIED BECAUSE THE OKLAHOMA SUPREME COURT HAS COMMITTED NO ERROR: ITS DECISION DOES NOT VIOLATE CONSTITUTIONAL DUE PROCESS AND IS CONSISTENT WITH THIS COURT'S *APPLICABLE* DUE PROCESS PRECEDENTS 16

A. Constitutional Due Process is a Fluid, Rather Than a Rigid Concept, With The Process Due Being Determined by The Surrounding Circumstances 16

B. Constitutional Due Process Does Not Demand The Same Procedural Safeguards in Legislative Proceedings as in Individual Adjudications 17

C. The Oklahoma Corporation Commission is Acting in a Legislative Capacity in the PUD 260 Remand 18

IV. THE STATES NEED NO GUIDANCE FROM THIS COURT. THEY ARE MERELY RECOGNIZING THIS COURT'S LEGISLATIVE/ ADJUDICATION DISTINCTION AND THE DIFFERENCES IN STATE LAW 23

V. THE OKLAHOMA SUPREME COURT'S *DICTA* REGARDING THE RULE OF NECESSITY DOES NOT REQUIRE THIS COURT'S INTERVENTION 24

CONCLUSION 25

Appendix A 1a

Appendix B 1b

Appendix C 1c

TABLE OF AUTHORITIES

Page

Cases:

Arkansas Louisiana Gas Co. v. Sun Oil Co., 554 P.2d 14 (Okla. 1976) 19

Bi-Metallic Investment Co. v. State Board of Equalization, 239 U.S. 441 (1915) . . . . . *passim*

Bowman v. Lewis, 101 U.S. 22 (1880) 24

Bute v. Illinois, 333 U.S. 640 (1948) 24

Cafeteria Workers v. McElroy, 367 U.S. 886 (1961) 16

Chickasha Cotton Oil Co. v. Corporation Commission, 562 P.2d 507 (Okla. 1977) 19

City of Bartlesville v. Corporation Commission, 199 P. 396 (Okla. 1921) 19

Colorado Interstate Gas Co. v. Federal Power Commission, 324 U.S. 581 (1944) 19

Community Natural Gas Co. v. Corporation Commission, 76 P.2d 393 (Okla. 1938) 19

Continental Telephone Co. v. Hunter, 590 P.2d 667 (Okla. 1979) 18

District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983) 19

Dixon v. Love, 431 U.S. 105 (1977) 16

F.C.C. v. WJR, the Goodwill Station, 337 U.S. 265 (1949). 17

Federal Trade Commission v. Cement Institute, 333 U.S. 683 (1948). 17

Fowler v. Lindsey, 3 U.S. (3 Dall.) 411 (1799) 14

In re Central Airlines, Inc., 185 P.2d 925 (Okla.1947) 19

In re Tampa Suburban Railroad Co., 168 U.S. 583 (1897) 14

Londoner v. City of Denver, 210 U.S. 373 (1908) 21, 22

Mathews v. Eldridge, 424-U.S. 319 (1976) 16

Morrissey v. Brewer, 408 U.S. 471 (1972) 16

Muskogee Gas & Electric Co. v. State, 186 P. 730 (Okla. 1920) 19

New Orleans Public Service, Inc. v. Council of City of New Orleans, 491 U.S. 350 (1989) 19

Oklahoma Gas & Electric Co. v. Wilson & Co., Inc., 54 F.2d 596 (10th Cir. 1931) 19

Oklahoma Hardware Co. v. Common Carrier Division, 405 P.2d 87 (Okla. 1965) 19

Oregon v. Hass, 420 U.S. 714 (1975) 23

Patterson v. U.S., 15 U.S. (2 Wheat.) 221 (1817) 10

Pierce Oil Corp. v. Phoenix Refining Co., 259 U.S. 125, 128-9 (1922) 13

Prentis v. Atlantic Coast Line Co., 211 U.S. 210 (1908). . . . . *passim*

Southern Oil Corp. v. Yale Natural Gas Co., 214 P. 131 (Okla. 1923) 19

Turpen v. Oklahoma Corporation Commission, 769 P.2d 1309 (Okla. 1988) 19

U.S. v. Florida East Coast Railway Co., 410 U.S. 224 (1973) 17, 21

Wiley v. Oklahoma Natural Gas Co., 429 P.2d 957 (Okla. 1967) 19

Constitutional Provisions:

Article IX, § 18, of the Oklahoma Constitution 15

Okla. Const. art. IX, § 15 15

Statutes:

Okla. Stat. art. IX, § 20 15

Okla. Stat. tit. 25, §§ 301-314 (1991 & Supp. 1993) 15

Rules:

Sup. Ct. R. 15.1 2

No. 94-73

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

SOUTHWESTERN BELL TELEPHONE COMPANY,
Petitioner,

v.

OKLAHOMA CORPORATION COMMISSION,
Respondent.

On Petition for Writ of Certiorari to the
Supreme Court of Oklahoma

BRIEF IN OPPOSITION FOR THE STATE OF OKLAHOMA

Respondent the Attorney General of the State of Oklahoma ("Attorney General") respectfully requests this Court to deny the petition for a writ of certiorari filed by Southwestern Bell Telephone Company ("Bell") which seeks a review of the *en banc* decision of the Oklahoma Supreme Court.

STATEMENT OF THE CASE

Bell's Petition misstates questions of fact, law and even the holding of the Oklahoma Supreme Court. Pursuant to SUP. CT. R. 15.1., the Attorney General submits the following statement of the case.

In 1986 the Oklahoma Corporation Commission initiated Cause No. PUD 000260 ("PUD 260") to inquire into the effect of a reduction in federal income taxes on the rates of twelve Oklahoma utilities, including Bell. Ultimately, because of the large number of respondents, the Commission conducted separate hearings for each named utility. After a full evidentiary hearing in which Bell fully participated, the Commission issued its order in PUD 260. The order, titled "Order Regarding Rates of Southwestern Bell Telephone Company," found that the reduction in federal income taxes had reduced Bell's operating expenses and allowed Bell to accumulate over $30 million in "surplus funds" during the pendency of the case. The Commission ordered Bell to prospectively reduce its rates and to use the surplus funds to modernize its Oklahoma network.

On appeal, the Commission's order was ultimately affirmed by the Oklahoma Supreme Court except as to four issues which were reversed and remanded for further proceedings (the "PUD 260 remand"). *See Southwestern*

Bell Telephone Co. v. Oklahoma Corporation Commission, Pet. App. 60a. The PUD 260 remand is still pending before the Commission. It is Bell's attempt to oust Commissioner Anthony from participating in the PUD 260 remand which prompted the case below and the present Petition.

On October 2, 1992, while the PUD 260 remand was pending before the Commission, Commissioner Bob Anthony announced that he had been cooperating with federal law enforcement authorities since 1988 in an investigation of corruption at the Commission. Commissioner Anthony stated that there had been "serious irregularities and unethical conduct" involving Bell's PUD 260 hearing. Contrary to the claim in Bell's Petition, Commissioner Anthony announced that his investigation had also disclosed unethical conduct and *ex parte* communications by representatives of another Oklahoma utility: Oklahoma Natural Gas Company.[1] Subsequently, Commissioner Anthony has indicated that the attorney who acted unethically while representing Oklahoma Natural Gas Company was the same attorney who offered Anthony cash while representing Bell.

---

[1] Anthony's announcement regarding Oklahoma Natural Gas Company immediately preceded his announcement regarding Bell but referenced a separate Commission docket number.

Claiming that Commissioner Anthony was biased against it, Bell sought Commissioner Anthony's recusal from the PUD 260 remand and from any other pending or future Commission proceedings involving Bell. In response, Commissioner Anthony asserted that Bell knew or should have known of his investigatory role as early as April 10, 1991, prior to the Oklahoma Supreme Court's remand of PUD 260 and prior to the Commission's hearing of a subsequent rate case, Cause No. PUD 000662 ("PUD 662"). In an effort to document his claim, Commissioner Anthony filed a motion in PUD 260 seeking to compel the production of certain corroborating documents from the Bell officials with whom he met on April 10, 1991. It was Commissioner Anthony's contention that the Bell officials who attended the meeting had reason to know of his cooperation with law enforcement. Bell refused to produce the documents and Anthony refused to recuse himself.

Upon Anthony's refusal to recuse himself, Bell mounted a two-pronged assault. First, Bell petitioned the Oklahoma Supreme Court in the case below[2] for an extraordinary writ disqualifying Commissioner Anthony from participating in the PUD 260 remand and in any other present or future Commission proceeding to which Bell was

---

[2] *Southwestern Bell Telephone Co. v. Oklahoma Corporation Commission*, Oklahoma Supreme Court Case No. 80,579.

a party. Secondly, Bell amended its pending appeal of PUD 662[3] to include Commissioner Anthony's alleged bias as an additional ground of error. The Oklahoma Supreme Court subsequently appointed a Special Master in the PUD 662 appeal to conduct an evidentiary hearing into the issue of whether Bell knew or should have known of Commissioner Anthony's cooperation with federal authorities prior to filing its appeal.

On May 25, 1993, the Oklahoma Supreme Court issued its initial opinion in the case below. Pet. App. 60a-74a. The court's decision threw out more than 70 years of Oklahoma precedent and held for the first time that utility ratemaking by the Corporation Commission is an adjudicative function. When this was brought to the court's attention in a petition for rehearing, the initial decision was withdrawn and the opinion set forth at Pet. App. 1a-59a was issued.

In its final opinion, the court below recognized the ample authority from its own jurisprudence, and the jurisprudence of this Court, that the establishment of utility rates is a legislative function rather than an adjudicative one. Pet. App. 5a-10a. As such, the court below correctly recognized that the specific relief requested by Bell is not

---

[3] *Southwestern Bell Telephone Co. v. Oklahoma Corporation Commission*, Oklahoma Supreme Court Case No. 80,333.

mandated by constitutional due process. 10a. Contrary to Bell's mischaracterization, the court did *not* hold "that the Due Process Clause places *no* limitations on the conduct of legislative proceedings." Pet. 7 (emphasis in original). Neither did the court indicate that it would "deny *all* due process claims arising from ratemaking proceedings." *Id.* (emphasis in original). In reality, the Oklahoma Supreme Court expressly recognized Bell's right to voice its due process concerns on appeal of the Commission's PUD 260 remand order. Pet. App. 12a. The court noted that, in such an event, it would exercise its independent judgment as to both the law and facts as required by the Oklahoma Constitution. *Id.* at 13a.

The court also expressly recognized Bell's right to seek Commissioner Anthony's recusal in any *adjudicative* matter coming before the Commission. *Id.* at 14a. In *dicta*, the court recognized the difficulties such a course would raise, given the absence of any Oklahoma constitutional or statutory provision for naming a replacement Commissioner. *Id.* at 14a-15a. The court also recognized the *possibility* that it might have to resort to the Rule of Necessity in such an instance. *Id.* In further *dicta*, the court suggested, *but did not decide*, that heightened appellate scrutiny might be an alternative way to satisfy due process in such an instance. *Id.* at 15a-17a. However, the court clearly evidenced a

willingness to "implement some...procedure to reach a just resolution.... *Id.* at 17a.

Meanwhile, the Special Master had concluded the evidentiary hearing ordered by the court in the PUD 662 appeal. The Report of the Special Master was issued June 28, 1993, and is reproduced for this Court's convenience at Appendix B to this Response. The evidence showed that during the hearing on the merits of PUD 260 and the pendency of PUD 662 before the Commission, an attorney representing Bell and a senior Bell official gave Commissioner Anthony illegal cash contributions for the express purpose of gaining "access" to him.[4] Commissioner Anthony immediately turned the cash over to federal law enforcement authorities. Commissioner Anthony has subsequently indicated his belief that a former Commissioner who heard PUD 260 may have accepted improper contributions from these same Bell representatives. At this writing, the former Commissioner and the Bell attorney have been indicted on federal bribery and conspiracy charges and are awaiting trial.

---

[4] Bell has not denied that the offers or payments occurred, but maintains that "[a]ny impropriety...was not authorized by or attributable to it." Pet. 3, n. 1. However, these are questions of fact and law which have yet to be answered.

Ultimately, the Special Master concluded that Bell did not know of Commissioner Anthony's cooperation with federal law enforcement authorities until his October 2, 1992, announcement. App. 4a. However, the Special Master also concluded that Bell knew, prior to Commissioner Anthony's announcement, that he had accepted what he believed to be illegal cash contributions from Bell's representatives. *Id* at 5a. The Special Master also concluded that such knowledge would have been grounds to move for Commissioner Anthony's disqualification prior to the hearings in PUD 260 and PUD 662, and prior to his decision in those hearings. *Id.* However, the Special Master concluded that Commissioner Anthony's belief was not objectionable to Bell *until it learned that Commissioner Anthony was cooperating with law enforcement officials*. *Id.* at 4a-5a.

The Special Master concluded that the evidence raised two additional unresolved questions:

1. Where a party has knowledge which is grounds for the disqualification of a Commissioner but does not ask for disqualification until after an adverse ruling has been made, can such party then seek the disqualification of the Commissioner on another ground?

2. As a matter of law, is a judge, or a Commissioner, automatically disqualified from hearing a case based on the misconduct of the party seeking to disqualify him?

Id. at 6a.

The Special Master went on to suggest that an additional evidentiary hearing be held to answer these questions. *Id.* As of this writing, the Oklahoma Supreme Court has not yet addressed these important questions.

SUMMARY OF ARGUMENT

Bell's Petition should be denied for several reasons. First, finality is not present. The Oklahoma Supreme Court has not yet determined whether Commissioner Anthony is biased or whether his participation in the PUD 260 remand violates constitutional due process. Further, open questions of fact and law remain before the court below concerning Bell's right to seek Commissioner Anthony's disqualification.

Secondly, Bell's Petition should be denied because Bell has another, more appropriate remedy available. Under Oklahoma law, Bell is entitled to an evidentiary hearing before the Commission, together with an appeal of right to, and an independent judicial review by the Oklahoma Supreme Court.

Thirdly, Bell's Petition should be denied because the Oklahoma Supreme Court has committed no error. It has merely applied the precedent of this Court which holds that constitutional due process does not require the recusal of a Commissioner from a legislative proceeding, even if the Commissioner believes that the party appearing before him

has committed a crime, so long as his mind is not irrevocably closed. Bell has made no such showing in this case.

Fourthly, Bell's claim of a split of authority among the states provides no support for its Petition. Federal constitutional due process does not demand the imposition of judicial procedural protections to state utility rate hearings. States are free to impose such protections as a matter of state law, but are not required to do so by the U.S. Constitution.

ARGUMENT

I. BELL'S PETITION SHOULD BE DENIED BECAUSE FINALITY IS ABSENT: THE OKLAHOMA SUPREME COURT HAS NOT DECIDED WHETHER COMMISSIONER ANTHONY IS BIASED, WHETHER HIS PARTICIPATION IN THE PUD 260 VIOLATES DUE PROCESS, OR WHETHER BELL HAS THE RIGHT TO SEEK COMMISSIONER ANTHONY'S DISQUALIFICATION.

A. Certiorari Should not be Granted Where Finality is not Present.

The writ of certiorari does not lie until the proceedings sought to be reviewed are completed, and a final determination had. *Patterson v. U.S.*, 15 U.S. (2 Wheat.) 221 (1817). Finality is not present here because the Oklahoma Supreme Court has not yet decided whether Commissioner Anthony is, in fact, biased, whether his participation in the PUD 260 remand violates constitutional

due process, or whether the actions of Bell's representatives preclude Bell from seeking Anthony's disqualification.

B. The Oklahoma Supreme Court has not Ruled on Bell's Claim of Bias or Whether Commissioner Anthony's Participation in the PUD 260 Remand is a Denial of Constitutional Due Process. The Court has Only Ruled That Bell is not Entitled to a Pre-hearing Disqualification of Anthony and Must Raise its Claim on Appeal.

Bell claims that the Oklahoma Supreme Court has determined "that the Due Process Clause places *no* limitations on the conduct of legislative proceedings." Pet. 7 (emphasis in original). Bell also claims that the court's reasoning "would compel it to deny *all* due process claims arising from ratemaking proceedings." *Id.* Bell also argues that "the court simply held that 'due process notice and hearing requirements' are 'inapplicabl[e]' to legislative proceedings and concluded, without more, that no due process violation had occurred." *Id.* at 13. These statements are untrue.

In reality, the court below decided only that Bell is not entitled to the particular remedy it is requesting, i.e., disqualification of Commissioner Anthony prior to the PUD 260 remand hearing. The court clearly recognized the applicability of constitutional due process to even legislative proceedings. Pet. App. at 6a & 9a-10a. Moreover, the court's opinion makes it abundantly clear that Bell is free to

assert its claim of bias on appeal, when there is an evidentiary record to examine. *Id.* at 12a-13a. Further, the court made it clear that if Bell should bring such an appeal, it would not be bound by the findings and conclusions of the Commission but would exercise its independent judgment as to both the law and the facts. *Id.*

Thus, contrary to Bell's Petition, the Oklahoma Supreme Court has not determined that Commissioner Anthony is or is not biased, nor has the court determined that due process is inapplicable to legislative proceedings.

C. The Oklahoma Supreme Court has not yet Ruled on Significant Questions of Law and Fact Impacting Bell's Petition: Whether the Bell Representatives Who Offered Money to Commissioner Anthony were Acting on Bell's Behalf and, if so, Whether Bell's Misconduct Precludes it From Seeking Anthony's Disqualification.

As noted above in the Statement of the Case, the Oklahoma Supreme Court has yet to rule on significant issues of law and fact which directly bear on the question of whether Bell can seek Commissioner Anthony's disqualification in the case below. The open issues are:

1. Whether the illegal acts of Bell's representatives are attributable to Bell; and

2. Whether Bell is entitled to seek Anthony's disqualification in the case below.

Although these questions are specifically pending in the PUD 662 appeal, they will have a very real impact upon the issues in this case. It is particularly significant that the evidence presented to the Special Master indicated that the wrongdoing by Bell's representatives occurred in connection with *PUD 260*, not PUD 662.

Constitutional rights, like other legal rights, can be waived or their assertion barred by deliberate election or by conduct inconsistent with such right. *See, e.g., Pierce Oil Corp. v. Phoenix Refining Co.*, 259 U.S. 125, 128-9 (1922). If the Oklahoma Supreme Court subsequently accepts the recommendation of its Special Master, it may ultimately determine that Bell improperly attempted to influence Commissioner Anthony *in Bell's favor* in connection with PUD 260, and was content to live with such bias until it learned Anthony was cooperating with law enforcement. If so, Bell could hardly be heard to complain that Commissioner Anthony should be disqualified from the PUD 260 remand because of a belief that Bell's representatives acted illegally. There is no authority for a party who "poisons its own well" by trying to illegally influence an elected official to complain of bias when the official cooperates with law enforcement authorities.

By granting the relief requested in Bell's Petition before these important factual and legal issues are resolved, this Court could deny the citizens of Oklahoma their right to have their utility rates determined by a Commissioner which they elected. Bell has provided no authority for such an extraordinary remedy. Further, as discussed below, denial

of Bell's writ will not result in a denial of constitutional due process to Bell on the PUD 260 remand.

II. BELL'S PETITION SHOULD BE DENIED BECAUSE ANOTHER MORE APPROPRIATE REMEDY IS AVAILABLE.

A. Certiorari Should be Denied Where an Adequate Alternative Remedy is Available.

It is well settled that the extraordinary remedy of certiorari will be refused where the petitioner has another adequate remedy available. *In re Tampa Suburban Railroad Co.*, 168 U.S. 583 (1897); *Fowler v. Lindsey*, 3 U.S. (3 Dall.) 411 (1799). Bell's Petition should be denied because it has such a remedy: An evidentiary hearing in the PUD 260 remand, including the right to present and rebut evidence, public deliberations of the Commission's decision, and an appeal of right to the Oklahoma Supreme Court which will independently review constitutional claims.

B. The Oklahoma Supreme Court's Decision Does not Deprive Bell of Substantial Justice Since Bell is Assured of a Number of Procedural Safeguards to Protect its Interests, Including the Right to an Evidentiary Hearing Before the Commission and an Appeal of Right to the Oklahoma Supreme Court.

The decision below works no significant hardship on Bell. Regardless of the decision of this Court, Bell will be compelled to go forward with the PUD 260 remand before the Commission in order to finally determine the impact of the Tax Reform Act of 1986. Neither the presence nor absence of Commissioner Anthony will significantly affect Bell's burden in the proceeding.

Further, Article IX, § 18, of the Oklahoma Constitution guarantees that Bell will receive notice and a hearing, including the opportunity to present evidence. Pet. App. 106a. As a three-member body, the vote of at least two Commissioners is required on all substantive matters. Okla. Const. art. IX, § 15; Pet. App. at 103a). In addition, Oklahoma's Open Meeting Act, Okla. Stat. tit. 25, §§ 301-314 (1991 & Supp. 1993), requires the Commissioners to conduct their deliberations and cast their votes publicly, with prior notice and preparation of written minutes summarizing their actions. The relevant portions of Oklahoma's Open Meeting Act are reproduced at Appendix C for the Court's convenience.

At the conclusion of the PUD 260 remand, Bell has an *appeal of right* to the Oklahoma Supreme Court. Okla. Stat. art. IX, § 20; Pet. App. at 108a-110a. Upon Bell's assertion of a violation of constitutional due process, the court is not bound by the Commission's actions but is required to exercise its own independent judgment as to both the law and facts. *Id.* If Bell is dissatisfied with the decision of the Oklahoma Supreme Court, it retains, of course, the option of petitioning this Court for review.

As can be seen from the foregoing, denial of Bell's Petition in this case will not impose an unreasonable hardship on Bell, but will merely require it to do what it would be

required to do absent any allegations of bias by Commissioner Anthony. Thus, this issue is not yet ready for this Court's review.

III. BELL'S PETITION SHOULD BE DENIED BECAUSE THE OKLAHOMA SUPREME COURT HAS COMMITTED NO ERROR: ITS DECISION DOES NOT VIOLATE CONSTITUTIONAL DUE PROCESS AND IS CONSISTENT WITH THIS COURT'S *APPLICABLE* DUE PROCESS PRECEDENTS.

A. Constitutional Due Process is a Fluid, Rather Than a Rigid Concept, With The Process Due Being Determined by The Surrounding Circumstances.

Bell attempts to define constitutional due process as an "all or nothing" concept by equating it only with trial-type, adjudicative procedural safeguards. However, it is well settled that constitutional "'[d]ue process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961). "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972); *accord Mathews v. Eldridge*, 424 U.S. 319, 334-5 (1976). The jurisprudence of this Court makes it clear that "procedural due process in the administrative setting does not always require application of the judicial model." *Dixon v. Love*, 431 U.S. 105, 115 (1977). Among the factors which this Court has considered

in its due process analysis is the nature of the administrative hearing at issue.

B. Constitutional Due Process Does Not Demand The Same Procedural Safeguards in Legislative Proceedings as in Individual Adjudications.

Contrary to Bell's assertions, this Court has recognized that the distinction between judicial and legislative functions is an element of due process analysis. *F.C.C. v. WJR, the Goodwill Station*, 337 U.S. 265, 276 (1949); *accord U.S. v. Florida East Coast Railway Co.*, 410 U.S. 224, 245 (1973). This Court has also clearly recognized that the standard for disqualifying an administrative decision-maker is substantially different in a legislative proceeding than in an adjudication. *Federal Trade Commission v. Cement Institute*, 333 U.S. 683 (1948). Constitutional due process does not require the disqualification of an administrative decision-maker in a legislative proceeding, even where he believes that the party before him has committed a crime, unless it is shown that his mind is "irrevocably closed" on the issues before him. *Id.* at 701. Absent such a showing, due process is satisfied by an opportunity to persuade the decision-maker through an evidentiary hearing. *Id.*

The bias which Bell alleges in connection with PUD 260 is even more remote than that alleged in *Cement Institute*. In *Cement Institute*, the Commissioners were alleged to have prejudged *the very issue they ultimately decided*, i.e., whether the activity complained of was illegal. In contrast, Commissioner Anthony will *never* have before

him the issue of whether the cash payments received from Bell's representatives were illegal or whether those payments were authorized by or attributable to Bell. All Commissioner Anthony will be called upon to decide in the PUD 260 remand are the four issues remanded by the Oklahoma Supreme Court. Bell will be free to participate in the evidentiary hearing to the extent it believes necessary and, as noted previously, has an appeal of right to the Oklahoma Supreme Court, which will exercise its independent judgment as to the law and facts related to constitutional issues.

C. The Oklahoma Corporation Commission is Acting in a Legislative Capacity in the PUD 260 Remand.

In the seminal case of *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 224 (1908), this Court recognized that state administrative bodies may be clothed with legislative, judicial and executive powers. This Court also recognized that such an entity acts in a legislative capacity where its action "looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power." *Id.* at 227. This is true even where the agency must decide judicial type issues in the process. *Id.* *Prentis* also clearly recognized that "[t]he establishment of a rate is the making of a rule for the future, and therefore is an act legislative not judicial in kind." *Id.* at 226 (emphasis added).

Based upon a state constitution virtually identical to that in *Prentis*, the Oklahoma Supreme Court has long recognized that the Oklahoma Corporation Commission is clothed with the powers of all three branches of government. *Continental Telephone Co. v. Hunter*, 590 P.2d 667, 668

(Okla. 1979); *Oklahoma Hardware Co. v. Common Carrier Division*, 405 P.2d 87, 90 (Okla. 1965); *In re Central Airlines, Inc.*, 185 P.2d 925 (Okla.1947). For more than 70 years, the Oklahoma Supreme Court has also recognized that the Corporation Commission acts in a legislative capacity when establishing utility rates. *See Chickasha Cotton Oil Co. v. Corporation Commission*, 562 P.2d 507, 509 (Okla. 1977); *Arkansas Louisiana Gas Co. v. Sun Oil Co.*, 554 P.2d 14, 16 (Okla. 1976); *Wiley v. Oklahoma Natural Gas Co.*, 429 P.2d 957, 958 (Okla. 1967); *Community Natural Gas Co. v. Corporation Commission*, 76 P.2d 393, 399 (Okla. 1938); *Southern Oil Corp. v. Yale Natural Gas Co.*, 214 P. 131, 135 (Okla. 1923); *City of Bartlesville v. Corporation Commission*, 199 P. 396, 398 (Okla. 1921); *Muskogee Gas & Electric Co. v. State*, 186 P. 730, 731 (Okla. 1920); *see also Oklahoma Gas & Electric Co. v. Wilson & Co., Inc.*, 54 F.2d 596, 598 (10th Cir. 1931). Bell is, or should be intimately familiar with the court's most recent confirmation of this principle since it occurred in the Bell rate case immediately preceding PUD 260. *Turpen v. Oklahoma Corporation Commission*, 769 P.2d 1309, 1317 (Okla. 1988). Bell simply ignores these precedents in its Petition.

Nor are these Oklahoma precedents contrary to those of this Court. The viability of the *Prentis* distinction between judicial and legislative proceedings has been recently recognized by this Court. *New Orleans Public Service, Inc. v. Council of City of New Orleans*, 491 U.S. 350, 370-1 (1989); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 476-7 (1983). This Court has also clearly recognized that ratemaking is a legislative function. *Feldman*, 460 U.S. at 371; *Colorado Interstate Gas Co. v. Federal Power Commission*, 324 U.S. 581, 589 (1944).

Bell asserts that the PUD 260 remand is adjudicative rather than legislative since it is directed specifically against Bell. This assertion is wrong for several reasons.

First, as noted in the statement of facts above, PUD 260 was an inquiry by the Corporation Commission into the effect of the 1986 Tax Reform Act on *all 12* major Oklahoma utilities, not just Bell. The inquiry was simply broken down into company-by-company phases to make the process manageable. This is virtually identical to the procedure which this Court found to be legislative in *Prentis* wherein the Virginia Corporation Commission, in a single proceeding, established *different rates* for all the railroad companies operating in the state. *Prentis*, *supra*, 211 U.S. at 225.

Secondly, even assuming that PUD 260 is aimed specifically at Bell, there can be no dispute that it was and is still a legislative proceeding under *Prentis*. In its original PUD 260 order, the Commission ordered Bell to reduce certain of its rates *on a going-forward basis*, effective January 1, 1987. Pet. App. at 80a & 81a, n. 10. The Commission did not render judgment imposing any liability on Bell or depriving it of some property right. In a clearly legislative action, the Commission ordered that the surplus cash collected during the pendency of the case be used to upgrade Bell's Oklahoma network *as a matter of policy to implement the Commission's long-standing goal of universal, single-party service to all Bell customers*. *Id.* at 86a-87a. As explained by the Oklahoma Supreme Court:

> The Commission found that "[u]pgrading multi-party service to single-party service will directly benefit approximately 54,000 Oklahoma customers who now have multi-party service. The Commission notes that

> the public comments submitted to this Commission overwhelmingly favored the proposed upgrade programs. *All ratepayers will benefit from these programs*....[T]he capital improvement plan proposed by the Staff avoids the borrowing costs and other costs that would normally be associated with such an upgrade. Such borrowing costs would normally be permissible and recoverable by [Bell] as costs of service. *By avoiding such costs, rates are kept lower for all Oklahoma ratepayers*."

Id. at 87a, n. 27 (emphasis added).

The Oklahoma Supreme Court largely affirmed the Commission's actions in PUD 260. However, because the court found the Commission's evidentiary record to be deficient in four specific areas, it remanded PUD 260 for additional hearings. The remand proceeding is not an effort by the Commission to punish Bell or take something away from it. The remand is simply a continuation of the original PUD 260 rate proceeding intended to clarify the exact impact of the Tax Reform Act. Clearly both PUD 260 and the PUD 260 remand are legislative proceedings as defined by *Prentis*.

Bell's assertion that ratemaking directed at a named utility is adjudicative misconstrues this Court's precedents. Bell's conclusion is based on *dicta* in *U.S. v. Florida East Coast Railway Co.*, *supra*, distinguishing the cases of *Londoner v. City of Denver*, 210 U.S. 373 (1908), and *Bi-Metallic Investment Co. v. State Board of Equalization*, 239 U.S. 441 (1915). However, a closer review of these cases clearly shows that they do not support Bell's proposition but, instead, are consistent with the decision of the Oklahoma Supreme Court below.

Londoner clearly involved an adjudication under the *Prentis* paradigm. There, an arm of the state sought to deprive individual landowners of their property, without a hearing, for past liabilities. Although the Court recognized that "[m]any requirements essential in strictly judicial proceedings may be dispensed with in proceedings of this nature," it held that due process required some type of hearing before the deprivation of property. *Londoner, supra,* 210 U.S. at 386. Of critical importance to the Court's decision was the fact that state law provided the landowners no opportunity to appeal. The obvious reason is that a right of appeal would have satisfied the requirement of due process.

In contrast, *Bi-Metallic* clearly involved a legislative proceeding under the *Prentis* paradigm. There, an arm of the state sought to increase the value of all taxable property within a county for purposes of *future* tax assessments. Like the Oklahoma Supreme Court in the case below, this Court held that the demands of constitutional due process are less stringent in a legislative proceeding and that no hearing was required. In distinguishing *Londoner*, the Court made it clear that the number of affected individuals is not the sole determining factor:

> [In *Londoner*, a] relatively small number of persons was concerned, *who were exceptionally affected*, in each case upon *individual grounds*, and it was held that they had a right to a hearing. But that decision is far from reaching a general determination dealing only with the principle upon which all the assessments in a county had been laid.

Bi-Metallic, supra, 239 U.S. at 446 (emphasis added).

As in *Bi-Metallic*, the Commission's actions in PUD 260 imposed future changes which impacted all of Bell's customers. Unlike *Londoner*, the Commission imposed no liabilities on Bell and did not deprive it of any property right. The PUD 260 remand is merely a court-mandated continuation of the original proceeding. Thus, PUD 260 and the PUD 260 remand are legislative proceedings under this Court's authority.

IV. THE STATES NEED NO GUIDANCE FROM THIS COURT. THEY ARE MERELY RECOGNIZING THIS COURT'S LEGISLATIVE/ ADJUDICATION DISTINCTION AND THE DIFFERENCES IN STATE LAW.

Bell claims that there is confusion among the various states which this Court needs to resolve. However, a review of the cases cited indicates that Bell is confusing the requirements of the U.S. Constitution from those imposed by state law. Bell fails to cite a single case in which a state court's characterization of utility ratemaking has denied a party the procedural safeguards required by the U.S. Constitution. There simply is no "emergency" demanding this Court's intervention. Further, even if a state chooses to characterize ratemaking as judicial and extends every conceivable procedural safeguard to the parties, it does not follow that federal due process requires such action or that guidance from this Court is required.

The Due Process Clause of the 14th Amendment acts as a limitation on state action. It sets forth the *minimum* due process requirements which states must satisfy. States are free to afford more protection, but not less. *Oregon v. Hass*, 420 U.S. 714, 719 (1975). Further, what constitutional due

process demands in one state it does not necessarily demand in another. *Bowman v. Lewis*, 101 U.S. 22, 31 (1880). "This clause...leaves room for much of the freedom which, under the Constitution of the United States and in accordance with its purposes, was originally reserved to the states for their exercise of their own police powers...." *Bute v. Illinois*, 333 U.S. 640, 649-50 (1948).

As has been previously and clearly stated, the People of the State of Oklahoma have determined that public utility ratemaking by the Corporation Commission is a legislative function. As such, the jurisprudence of this Court holds that the procedural safeguards associated with formal adjudications are not required by the U.S. Constitution. Further, as previously noted, the decision rendered by the Oklahoma Supreme Court will afford Bell sufficient procedural safeguards to protect its interests.

V. THE OKLAHOMA SUPREME COURT'S *DICTA* REGARDING THE RULE OF NECESSITY DOES NOT REQUIRE THIS COURT'S INTERVENTION.

As noted previously herein, the decision below does not apply the Rule of Necessity, but merely discusses it in *dicta*. This is not a sufficient basis for the exercise of this Court's extraordinary jurisdiction. A review by this Court may be appropriate, if at all, when and if the Oklahoma Supreme Court applies the rule.

CONCLUSION

For all the above and foregoing reason, the Attorney General of the State of Oklahoma respectfully requests this Court to deny Bell's Petition for Writ of Certiorari to the Supreme Court of Oklahoma.

SUSAN B. LOVING
Attorney General of the
State of Oklahoma

RICK D. CHAMBERLAIN
Assistant Attorney General
Counsel of Record
112 State Capitol
2300 North Lincoln Boulevard
Oklahoma City, OK 73105
(405) 521-3921

August 12, 1994

Attorneys for the Respondent, State of Oklahoma

Appendix A

OKLA. STAT. TIT. 74, SEC. 18b(A)(20) (SUPP.1993)

Sec. 18b. Duties of Attorney General - Counsel of Corporation Commission as representative on appeal from Commission.

A. The duties of the Attorney General as the chief law officer of the state shall be:

....

20. To represent and protect the collective interests of all utility customers of this state in rate-related proceedings before the Corporation Commission or in any other state or federal judicial or administrative proceeding.

....

Appendix B

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

SOUTHWESTERN BELL TELEPHONE COMPANY,	)	
Appellant,	)	
v.	)	No. 80,333 (cons. w/Nos. 80,334 80,340, 80,342 and 80,345)
OKLAHOMA CORPORATION COMMISSION and the STATE OF OKLAHOMA,	)	
Appellees.	)	
SOUTHWESTERN BELL TELEPHONE COMPANY,	)	
Petitioner,	)	
v.	)	No. 81,735
OKLAHOMA CORPORATION COMMISSION	)	
Respondent.	)	
SUSAN B. LOVING, ATTORNEY GENERAL,	)	

Petitioner,	)	
v.	)	No. 81,783
OKLAHOMA CORPORATION COMMISSION	)	
Respondent.	)	

REPORT OF SPECIAL MASTER

This matter came on for hearing pursuant to a referral Order of the Oklahoma Supreme Court dated June 28, 1993, directing the special master to conduct a hearing and to submit findings of fact and conclusions of law as to the following questions:

1. Was Commissioner Anthony an FBI informant during the period of time Commission Cause No. PUD-662 was pending before the Corporation Commission, including both the evidentiary and deliberative phase?

2. When did Southwestern Bell Telephone Company know, or should have known, of his involvement as an informant?

3. What was the earliest date of that actual or imputed knowledge?

The special master was not directed to consider any evidence of wrongdoing on the part of SWBT. The evidentiary hearing was held on September 3, 1993. Based

on the evidence introduced at that hearing, the special master makes this report.

FINDINGS OF FACT

1. The parties stipulated that Commissioner Anthony did serve as an informant for the Federal Bureau of Investigation (FBI) from December, 1988, to at least October 2, 1992, in connection with an investigation of suspected wrongdoing at the Corporation Commission.

2. Commissioner Anthony was actively assisting the FBI during the entire time that PUD-662 was pending before the Commission.

3. Commissioner Anthony's activities in connection with the FBI investigation included contacts with representatives of Southwestern Bell Telephone Company (SWBT), among others. In this connection evidence was received at the evidentiary hearing that Commissioner Anthony made recordings of his conversations and meetings with SWBT agents and employees. Such evidence was that Commissioner Anthony had received illegal cash contributions (which he immediately gave to the FBI) from William Anderson, attorney for SWBT in PUD-260 and PuD-662 pending before the Commission during the period in question and from David Miller, SWBT's Vice President in Oklahoma for Governmental and Regulation Affairs and also a registered lobbyist for SWBT. The further evidence in this regard was that the cash was accompanied by false lists of contributors. This was given for the asserted purpose of having "access" to him, which was no more or no less than an effort to have him look with favor on their pending rate matters.

4. There was no evidence that SWBT or any of its agents or employees learned of Commissioner Anthony's role as an informant until he publicly announced his cooperation with the FBI on October 2, 1992. On the issue of whether SWBT should have known that Commissioner Anthony was cooperating with the FBI, there was ample evidence submitted in the evidentiary hearing concerning Mr. Anthony's efforts to maintain the secrecy of his role as an informant, such evidence being sufficient to outweigh any assertions that SWBT should have, in the exercise of reasonable diligence, discovered Anthony's role with the FBI prior to his public announcement on October 2, 1992.

5. Even if it should be determined that SWBT should have had some suspicions that Commissioner Anthony was cooperating with the FBI, a diligent attempt by SWBT to confirm such suspicions would have revealed nothing since, again, Mr. Anthony was certainly trying to keep that relationship a secret. Moreover, the FBI, under its established policies, would not have revealed anything about his cooperating with them.

6. Due to the very limited scope of the special master's inquiry mandated by the Supreme Court, it should be noted that SWBT did not offer any evidence, if they had such evidence, to rebut the testimony of Commissioner Bob Anthony relating to illegal contributions to him by William Anderson and David Miller.

7. When Mr. Anthony voted in PUD-662 by Order 367868 to reduce SWBT's rates by $93.7 million dollars annually and order SWBT to refund $184.4 million dollars to its customers, SWBT brought this lawsuit asking for a new trial on the grounds that it did not know that Mr. Anthony was acting as an FBI informant. SWBT contends

that Anthony's actions denied them "due process" as he was biased and consequently they did not receive a fair hearing, and if they had known of such activities on his part they would have sought to disqualify him from participating in their case.

CONCLUSIONS OF LAW

1. Based on the facts set out above, the issues submitted for resolution by the special master are answered as follows:

> 1. Was Commissioner Anthony an FBI informant during the period of time Commission Cause no. PUD-662 was pending before the Corporation Commission, including both the evidentiary and deliberative phase?
>
> Answer: Yes.
>
> 2. When did Southwestern Bell Telephone Company know, or should have known, of his involvement as an informant:
>
> Answer: October 2, 1992.
>
> 3. What was the earliest date of that actual or imputed knowledge:
>
> Answer: October 2, 1992.

2. From the greater weight of the evidence heard by the special laster as set out above, it is concluded that SWBT knew that Commissioner Anthony has ostensibly accepted what he believed to be illegal cash contributions

from their employees which would certainly have been grounds for SWBT to move for his disqualification prior to any hearings and prior to his decision in those hearings. Obviously SWBT believed it to be in its best interests not to seek his disqualification.

3. Once Commissioner Anthony had voted against SWBT's interests and publicly announced his four (4) years of full cooperation with the FBI's investigation of the Commission, SWBT seeks in this case to receive a new trial. This raises many issues and questions. One question is whether a party to an action can require that the trier of the facts be disqualified because of such party's own wrongdoing. If there had been no illegal cash contributions or wrongdoing on the part of SWBT, then certainly SWBT would not have any reasonable grounds for believing Commissioner Anthony would be biased against it.

4. If the only issue the Oklahoma Supreme Court wants to consider is whether Commissioner Anthony was assisting the FBI in an investigation of the Commission and this was not known or could not have been known by SWBT, then it is respectfully submitted that a new trial before the Commission should be granted. It is further recommended that the special master that such new trial should not be de novo unless the Supreme Court is of the opinion that Commissioner Anthony's alleged or presumed bias did in some way affect the evidentiary hearing conducted by Administrative Law Judge Goldfield or his decision.

5. On the other hand, if the Supreme Court determines that the other questions raised in the evidentiary hearing before the special master should be resolved before this appeal can be decided, then it suggested that another

evidentiary hearing will be necessary to determine these issues:

1. Where a party has knowledge which is grounds for the disqualification of a Commissioner but does not ask for disqualification until after an adverse ruling has been made, can such party then seek the disqualification of the Commissioner on another ground?

2. As a matter of law, is a judge, or a Commissioner, automatically disqualified from hearing a case based on the misconduct of the party seeking to disqualify him?

It is suggested that an additional evidentiary hearing would be necessary so as to afford SWBT an opportunity to rebut Commissioner Anthony's testimony and to have the law fully briefed on these issues.

Respectfully submitted this 5th day of October, 1993.

/s/ William S. Myers, Jr.
Judge William S. Myers, Jr.
Special Master

Appendix C

EXCERPTS FROM THE OKLAHOMA OPEN MEETING ACT, OKLA. STAT. TIT. 25, §§ 301-314 (1991 & SUPP. 1993)

§ 302. Public policy. - It is the public policy of the State of Oklahoma to encourage and facilitate an informed citizenry's understanding of the governmental processes....

§ 303. Times and places - Advance Notice. - All meetings of public bodies, as defined hereinafter, shall be held at specified times and places which are convenient tot he public and shall be open to the public....All meetings of such public bodies...shall be preceded by advance public notice specifying the time and place of each such meeting to be convened as well as the subject matter or matters to be considered at such meeting....

§ 304. Definitions. - As used in this act:

1. "Public body" means...all...commissions,...in the State of Oklahoma supported in whole or in part by public funds....

2. "Meeting" means the conducting of business of a public body by a majority of its members being personally together.

....

§ 305. Recording of votes. - In all meetings of public bodies, the vote of each member must be publicly cast and recorded.

§ 306. Circumvention of act. - No informal gatherings or any electronic or telephonic communications among a majority of the members of a public body shall be used to decide any action or to take any vote on any matter.

§ 312. Minutes of Meetings. - The proceedings of a public body shall be kept by a person so designated by such public body in the form of written minutes which shall be an official summary of the proceedings showing clearly those members present and absent, all matters considered by the public body, and all actions taken by such public body. The minutes of each meeting shall be open to public inspection....